87-124

No.————

Supreme Court, U.S.
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CLERK

In The
Supreme Court of the United States
October Term, 1987

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ROBERT S. TAFOYA,

Petitioner,

vs.

JAMES ADAMS, et. al.,

Respondents.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

———o———

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QUESTIONS PRESENTED

1. Whether the pleadings filed by the Petitioner in the District Court, when construed in a light most favorable to him, stated a cause of action of national origin discrimination under 42 U.S.C. §§ 1981 and 1983.

2. Whether Title VII is the exclusive remedy in an employment discrimination case against a state or local governmental employer intended to exclude claims under 42 U.S.C. §§ 1981 and 1983 when these claims are based upon the same set of facts as the Title VII claim.

LIST OF PARTIES

The list of parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Robert S. Tafoya, Petitioner (plaintiff-appellant in the proceedings below);
2. James Adams, Respondent (defendant-appellee in the proceedings below);
3. The City and County of Denver, a Municipal Corporation, Respondent (defendant-appellee in the proceedings below).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Robert S. Tafoya, asks this Court to review the April 21, 1987 judgment of the United States Court of Appeals for the Tenth Circuit in Tafoya, Plaintiff-Appellant, v. Adams, et. al., Defendants-Appellees.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Tafoya v. Adams,* — F.2d —, 43 EPD ¶ 37,038 (10th Cir. 1987). The slip opinion is set forth as Appendix A to this petition. The memorandum opinion and order of the District Court is reported at 612 F. Supp. 1097 (D. Colo. 1985). This memorandum opinion and order is set forth as Appendix B to this petition.

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JURISDICTION

The judgment of the Court of Appeals was issued and entered April 21, 1987. This Court has jurisdiction to review the Court of Appeals' decision by writ of certiorari under 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

The relevant provisions of the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. § 2000e-2 (e) (a) and 3 and The Civil Rights Act of 1866 and 1871, 42 U.S.C. §§ 1981 and 1983 are set forth in Appendix E to this petition.

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STATEMENT OF THE CASE

This is an employment discrimination action brought by the Petitioner Tafoya ("Tafoya") against his former employer, Respondent City and County of Denver ("City") and his former supervisor, Respondent James Adams ("Adams") who supervised Tafoya during the times relevant to his Complaint (Appendix C) below. Tafoya commenced this action in the United States District Court for the District of Colorado on July 27, 1984. Tafoya attempted to invoke the jurisdiction of the District Court pursuant to 28 U.S.C. § 1343(3) and (4) relating to actions under 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 2201 and 2202 relating to declaratory judgments, and 42 U.S.C. § 2000e-5(f) (Title VII). In his pleadings filed in the District Court, Tafoya alleged that he was discriminated against regarding the terms and conditions of his employment with the City because of his national origin, Mexican-American, and because he had previously opposed employment practices which he reasonably believed to be unlawful. Specifically, Tafoya claims that Adams gave him poor and unacceptable job performance ratings which were not commensurate with his actual job performance; caused him to be placed on probationary status thereby jeopardizing his employment; attempted to coerce him into submitting a resignation from his employment; encouraged and created dissension amongst the subordinates of Tafoya thereby obstructing his efforts to perform his assignments and duties in a satisfactory manner and terminated him from his employment on January 20, 1984. At the time of the termination Tafoya held the position of Director II with the Department of Parks and Recreation of the City. Tafoya had previously held that position and was demoted

from this position in 1980 which resulted in his filing an action in the United States District Court for the District of Colorado during that same year alleging discrimination against him on the basis of his national origin. As a settlement to that action Tafoya and the City agreed that he would be promoted to the position of Director II which re-promotion was accomplished and effective on February 1, 1983. At the time of the re-promotion, Tafoya was placed under the direct supervision of Adams. In his Complaint Tafoya alleged that shortly after his reinstatement to the position of Director II, Adams advised him that he was going to "get rid" of him for having previously filed a charge of discrimination and a lawsuit against the Department of Parks and Recreation. Tafoya further alleges that from the date of his re-promotion to the position of Director II to the date of his termination he performed his duties and responsibilities in a satisfactory manner.

The Respondent denied that Tafoya had been subjected to unlawful employment practices or otherwise discriminated against because of his national origin or for having previously opposed employment practices reasonably believed by him to be unlawful. The Respondents asserted various affirmative defenses among which were "(1) that Tafoya had failed to state a claim upon which relief may be granted; (2) that he failed to mitigate his damages; (3) that Adams at all times acted in good faith within the scope of his employment and was therefore clothed with a good-faith qualified immunity; (4) that the Tafoya's claim for punitive and exemplary damages were barred by C.R.S. § 13-80-104 and (5) that the City could not be held liable for punitive damages under Colorado and federal law.

As indicated above, Tafoya initiated this action in the District Court on July 27, 1984. On September 11, 1984 the Respondents filed their Answer to the Tafoya's Complaint generally denying the allegations in the Complaint and alleging various defenses as set forth above. Discovery was subsequently completed and a stipulated Pretrial Order (Appendix D) was tendered by the parties and signed by the District Court on April 3, 1985. The matter was then set for a jury trial on the claims under 42 U.S.C. §§ 1981 and 1983 and trial to the court on the claims under 42 U.S.C. § 2000e *et seq.* commencing July 11, 1985. On February 15, 1985 the Respondents filed a Motion For Partial Summary Judgment moving the District Court to dismiss Tafoya's claims under 42 U.S.C. §§ 1981 and 1983 pursuant to Rule 56 of the Federal Rules of Civil Procedure supported by a Memorandum Brief. On March 12, 1985 Tafoya filed a Memorandum Brief in opposition to the Respondents' motion. A reply memorandum brief was filed by the Respondents' on March 20, 1985. The issues raised in the Respondents' motion were taken under advisement by the District Court and on July 8, 1985 the District Court issued its Memorandum opinion and Order granting the Respondents' Motion For Partial Summary Judgment dismissing the Tafoya's claims under 42 U.S.C. §§ 1981 and 1983 against both Respondents. Judgment against Tafoya and in favor of the Respondent was entered by the District Court on July 12, 1985 on Tafoya's Title VII claims. On August 12, 1985 Tafoya filed a timely Notice of Appeal, appealing to the Court of Appeals the Memorandum Opinion and Order and Judgment of the District Court. After briefing and oral argument by the parties, the Court of Appeals affirmed the District Court's grant-

ing of Respondents' Motion for Partial Summary Judgment entering judgment on April 21, 1987.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in effect avoided the substantial question brought before the Court by the parties to this case, namely, whether Title VII is the exclusive remedy in employment discrimination cases against state and local governments when claims based upon the same facts are brought under 42 U.S.C. §§ 1981 and 1983. Instead of addressing this question as advanced by the Petitioner and responded to by the Respondents, the Court looked to the Petitioner's Complaint and concluded that it did not sufficiently state a claim of national origin discrimination under 42 U.S.C. § 1981. The Respondents never addressed the sufficiency of Petitioner's Complaint in the Court of Appeals. The Petitioner submits that his pleadings as a whole sufficiently stated a claim under 42 U.S.C. § 1981.

Review of this substantial question is necessary because the confusion, conflict and mixed signals on this question in the decisions of the circuit courts. Cf. *Gooding v. Warner-Lampert Co.,* 744 F.2d 354 (3d Cir. 1984); *Irby v. Sullivan,* 737 F.2d 418 (5th Cir. 1984); *Johnson v. City of Cincinnati,* 450 F.2d 796 (6th Cir. 1971); *Trigg v. Fort Wayne Community Schools,* 766 F.2d 299 (7th Cir. 1985) and *Bradshaw v. Zoological Society of San Diego,* 569 F.2d 1066 (9th Cir. 1978) where these Courts have recognized Title VII, 42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims as

totally separate and distinct even when based upon the same operative facts to those cases such as *Rivera v. City of Wichita Falls,* 665 F.2d (5th Cir. 1983) and *Day v. Wayne County Board of Auditors,* 749 F.2d 1199 (6th Cir. 1984) which seem to suggest the opposite.

I.

THE DECISION BELOW WAS INAPPROPRIATE IN THAT PLEADINGS FILED IN THE DISTRICT COURT, WHEN TAKEN AS A WHOLE, DID STATE A CLAIM UNDER 42 U.S.C. § 1981 AND, THEREFORE, THE SUBSTANTIAL QUESTION OF WHETHER TITLE VII PROVIDES THE EXCLUSIVE REMEDY FOR EMPLOYMENT DISCRIMINATION CLAIMS TO THE EXCLUSION OF 42 U.S.C. § 1981 AND 42 U.S.C. § 1983 SHOULD HAVE BEEN ADDRESSED BECAUSE OF THE CONFUSION IN THE CIRCUIT COURTS.

As indicated above, the District Court, in granting Respondent's Motion for Partial Summary Judgment, held that Title VII was the exclusive remedy against a local governmental employer to the exclusion of claims under 42 U.S.C. §§ 1981 and 1983 when all claims were based upon the same set of operative facts. This was the precise issue that the parties put before the Court of Appeals for its determination. The Court chose not to decide this important issue but, *sua sponte,* decided the case looking to the sufficiency of the allegations in the Petitioner's Complaint. An attack upon the sufficiency of the Petitioner's allegations was never made by the Respondents before the District Court or the Court of Appeals.

The Petitioner submits that the pleadings filed by him in the District Court indicate that his claims were not pure retaliation claims as suggested by the Court of Appeals

but included claims of national origin discrimination cognizable under 42 U.S.C. § 1981. The decision of the Court of Appeals makes no mention of the Pretrial Order stipulated to by the parties and signed by the District Court. (See Appendix D) Paragraph III A of the Pretrial Order states as follows:

> "The Plaintiff claims that he was discriminated against by the defendants regarding the terms and conditions of his employment because of his *national origin, Mexican-American,* and because he had previously opposed employment practices which he reasonably believed to be unlawful." (Emphasis added)

The effect of a pretrial order is to control the subsequent course of the litigation. See 3 Moore ¶ 16.19. It has been held that when an issue has been stated in the pretrial order, it is properly tried even though it is not raised in the prior pleadings. See *Howard v. Kerr Glass Mfg. Co.*, 699 F.2d 330 (6th Cir. 1983) Such is the case here. The Complaint (Appendix C) was focused upon by the Court of Appeals and found by it not to have stated a claim of national origin discrimination under 42 U.S.C. § 1981. However, inclusion of the national origin discrimination issue in the Pretrial Order effectively amended the complaint to include it. See *Syrie v. Knoll International,* 748 F.2d 304 (5th Cir. 1984) where negligence claim was allowed because it was included in the pretrial order although not included in the prior pleadings. It should also be noted that the District Court was apparently of the same opinion as indicated by its observation that "there might also have been some discrimination involved with this termination." When a Court of Appeals affirms a District Court grant of summary judgment such as here, the Supreme Court must construe the *record* most favorably to the plaintiff. See

Wolston v. Reader's Digest Association, 443 U.S. 157, 162 n 5 (1979) Additionally, claims of retaliation are cognizable under 42 U.S.C. § 1981. See *Cole v. Choctaw County Board of Education,* 471 F.2d 777, 779 (5th Cir. 1973), *cert. denied,* 411 U.S. 498 (1973).

II.

THIS COURT CAN ADDRESS THE ISSUE OF THE EXCLUSIVITY OF TITLE VII SINCE THE ISSUE WAS PRESENTED TO BOTH THE DISTRICT COURT AND THE COURT OF APPEALS AND THE RECORD HERE IS ADEQUATE.

As the Court of Appeals below correctly noted there was no evidence taken on the matter of the Respondents Motion for Partial Summary Judgment. The record on this matter consists of the motion, briefs and decision of the District Court. Part of this record is before this Court as Appendices to this petition. The remaining portions can easily be submitted to this Court since they were part of the record below thereby making the record before this Court adequate in order to determine the question. Since the question was presented to both the District Court and Court of Appeals below, it would be appropriate for this Court to consider the question. See *Thigpen v. Roberts,* 468 U.S. 27 (1984).

III.

THE DISTRICT COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT HOLDING THAT TITLE VII WAS THE EXCLUSIVE REMEDY PREEMPTING CLAIMS UNDER 42 U.S.C. § 1981 AND 42 U.S.C. § 1983 MADE UNDER THE SAME SET OF OPERATIVE FACTS.

The Petitioner alleged in his pleadings that the Respondents terminated him from his employment because of

his national origin and in retaliation for previously opposing employment practices reasonably believed by him to be unlawful. Claims alleging discrimination because of national origin and retaliatory discharge are cognizable under 42 U.S.C. § 1981. See *St. Francis College v. Al-Khazraji*, — U.S. —, 43 EPD ¶ 37,018 (1987); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979); *Pinkard v. Pullman-Standard*, 678 F.2d 1211 (5th Cir. Unit B 1982), *cert. denied* 103 S. Ct. 729 and *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977).

The District Court correctly held that § 1981 provides remedies as well as substantive rights independent of Title VII remedies for racial and national origin discrimination by state and municipal officials in violation of the Fourteenth Amendment. In its analysis of the relationship between rights and remedies under Title VII and § 1981, the District Court cited the cases of *Brown v. General Services Administration*, 425 U.S. 820 (1976) where this Court concluded that Title VII provided the exclusive remedy for federal employees complaining of job discrimination and may not secure additional remedies by proceeding also under 1981; *Great American Savings and Loan Ass'n. v. Novotny*, 442 U.S. 366 (1979) where this Court held that a deprivation of rights created by Title VII cannot be the basis for a cause of action under 42 U.S.C. § 1985(c); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1 (1981) where this Court held that the existence of express remedies in the Federal Water Pollution Control Act and the Marine Protection Research and Sanctuaries Act of 1972 supplanted any remedy that might otherwise be available under § 1983 and *Smith v. Robinson*, 468 U.S. 992 (1984) where this Court determined that Congress intended the Education of the Handi-

capped Act to be the exclusive remedy through which a plaintiff may assert an equal protection claim to a publicly financed education. The District Court, while acknowledging that these decisions did not directly address the issue in this case, indicated that their importance and reasoning are clear to resolve the issues in the present case. With the understanding that Title VII provides a comprehensive and detailed statutory scheme which provides specific remedies for the rights created therein and the reasoning of the *Brown, Novotny, Sea Clammers* and *Smith v. Robinson* decisions, the District Court concluded that an allowance of assertions of rights created by Title VII in a claim brought under any other statute would be to subvert this comprehensive statutory scheme. While recognizing that the legislative history regarding the inclusion of state and local employees within the protection of Title VII indicates that Congress did not intend to preclude them from bringing § 1981 claims completely, this history does not indicate whether Congress intended to permit the concurrent assertions of Title VII claims with § 1981 claims in a single judicial proceeding. In resolving this dilemma, the District Court concluded that claims under § 1981 would be permissible only if not based upon violations of rights set forth in Title VII. After its detailed analysis, the District Court cited two Circuit decisions, *Rivera v. City of Wichita Falls*, 665 F.2 531 (5th Cir. 1982) and *Day v. Wayne Cty. Bd. of Auditors*, 749 F.2d 1199 (6th Cir. 1984), for the proposition that claims under § 1981 may be asserted along with Title VII claims in the same judicial proceeding as long as the former claims are independent and not based upon violations of rights set forth in Title VII. The District Court also cited several district court decisions standing

for the same proposition which the Petitioner will not enumerate here. The cases relied upon by the District Court are distinguishable from the present case and, therefore, the District Court's conclusion is not on all fours with the circumstances and facts of the present case.

This Court has previously decided the viability of a § 1981 claim in relation to one under Title VII. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 this Court stated as follows:

> We are satisfied, also, that Congress did not expect that a § 1981 court action usually would be resorted to only upon completion of Title VII procedures and the Commission's efforts to obtain voluntary compliance. Conciliation and persuasion through the administrative process, to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of invidious employment discrimination. We recognize too, that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action would weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application as successful conciliation tends to be. But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true. We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a § 1981 action while an EEOC claim is pending.

> We generally conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.

There can be no question regarding the independence of § 1981 claims from Title VII claims.

Although the *Johnson* decision involved a private employer, the holding is applicable to a municipal employer such as we have here. The fact that a municipal employer is a public employer is of no consequence. In considering the passage of the Equal Employment Opportunity Act of 1972 (the amendment to Title VII which included states and municipalities), the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981. 118 Cong. Rec. 3371-3373 (1972). The holding of the Supreme Court in *Brown* is limited only to the rights created for federal employees and the exclusivity of Title VII in combating employment discrimination was not intended to be extended to any other class of employees. Professor Larson commenting on the *Brown* decision states:

> The Supreme Court, in *Brown v. General Services Administration,* ruled unqualifiedly that suit against the Federal government for employment discrimination will not lie under § 1981. Section 717, which was added to Title VII in 1972 and which extended that Title for the first time to Federal employment, was held to have been intended to supply an exclusive remedy.
>
> Since the matter is definitely settled, there is no occasion to undertake a detailed analysis of the Court's rationale, except to the extent necessary to show that the decision and its reasoning are *strictly limited* to the area of Federal employment. The Court was, of course, acutely aware of *Johnson,* in which it had reached the opposite conclusion as to private employment the previous year. (Emphasis added)

See Larson, *Employment Discrimination*, Vol. 3, § 89.21, pp. 18-18 to 18-20. Concerning the question of the exclusivity doctrine expressed in *Brown* as to its possible extension to state and municipal employees, Professor Larson states:

> Although the Supreme Court has not expressly dealt with the question, it seems reasonably clear that state and local governments and officials are not immune to suit under 1871 Civil Rights Act or under any theory of preemption by Title VII. In *Johnson v. City of Cincinnati*, the district court had held that the 1871 Act had been so preempted, but it was reversed on this issue by the Sixth Circuit. Although most cases in this catagory involve section 1983, which is routinely used in suits by state and local employees, there appears to be no distinction for purposes of the preemption issue between sections 1983 and 1981. Moreover, none of the reasoning in *Brown*, which rested almost entirely on legislative history specifically concerned with Federal employees, applies to state and local employees. The better conclusion, then, seems to be that although the opinion in *Johnson v. Railway Express Agency* is expressly confined to private employment, the Court's rationale and the rationale of the circuit court cases endorsed by the Supreme Court in that opinion, beginning with the fundamental presumption against repeals by implication, are broad enough to cover state and local employment. In other words, the basic rule is that of non-preemption, with *Brown* representing a special exception based on explicit legislative history as to Federal employment.

See Larson, *Employment Discrimination*, Vol. 3, § 89.22, pp. 18-21 to 18-22. This Court's decisions in *Novotny, Sea Clammers*, and *Smith v. Robinson* involve statutes (§ 1985(c) and § 1983) which, unlike § 1981, do not create any substantive rights but merely provide remedies for

violations of substantive rights. This is a very important distinction to be addressed in resolving the issues in the present case. § 1985 is purely a remedial statute and does not create substantive rights. See *Novotny, supra* and Larson, *Employment Discrimination,* Vol. 1, § 7.33(b), p. 2-117. Likewise, § 1983 provides remedies but not substantive rights. See *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979). Unlike § 1983 and § 1985, § 1981 does create such substantive rights. See *Johnson v. Railway Express Agency, Inc., supra.*

The District Court below relied upon two Circuit decisions, *Rivera* and *Day,* in concluding that Title VII provided the exclusive remedy for non-federal employees complaining of employment discrimination. The reference in *Rivera* concerning the issues present here appear in footnote 4 at page 534. The *Rivera* case involved a class action of all Spanish surnamed Americans of Mexican descent complaining of class-wide claims of a pattern and practice of discrimination. The Court in *Rivera* in footnote 4 indicated that § 1981 applies only to racial discrimination and may not address claims of national origin discrimination. The appellant here submits that the Court in *Rivera* was persuaded by the dubiousness of a national origin claim under § 1981. As indicated above a national origin claim under § 1981 is cognizable in this circuit. See *Manzanares v. Safeway Stores, Inc., supra.* The *Day* case involved a retaliation claim brought by the plaintiff under § 1981, § 1983 and Title VII. The District Court there affirmed the findings of a Master who found that the defendant discriminated against the plaintiff in violation of Title VII but further found that the plaintiff failed to establish a *prima facia* case under § 1981 or § 1983. The Court of Appeals

in *Day* specifically found that the plaintiff had abandoned his 1981 claim and therefore addressed the exclusivity question of Title VII in relation only to § 1983. Therefore, the *Rivera* and *Day* decisions do not stand for the proposition that Title VII preempts claims under § 1981. The decision in *Torres v. Wisconsin Department of Health and Social Services,* 592 F.Supp. 922 (E.D.Wis. 1984) relied upon by the Court below, again, does not involve any § 1981 claims but strictly violations of Title VII, § 1983, § 1985, and § 1986. Like *Rivera* and *Day, Torres* is distinguishable due to the fact that no § 1981 claims were raised as were raised in the present case.

As previously indicated in the argument on § 1981 above the case law is well settled that § 1983 does not create substantive rights but merely provides a remedy for violations of substantive rights. Had the Petitioner predicated his action only on Title VII and § 1983, the decision of the District Court below would have probably been correct. However, since the Petitioner alleged violations of § 1981 the opposite conclusion must result. In *Irby v. Sullivan,* 737 F.2d 418 (5th Cir. 1984) the Court faced with facts almost identical to the facts that we have here stated:

> Although Irby has cited an incorrect predicate for utilization of the section 1983 remedy, his section 1983 claim need not fail for that reason for this Court has held that a claim under 42 U.S.C. § 1981 may be based on retaliatory action taken in response to an employee's filing of an EEOC charge or civil rights lawsuit alleging racial discrimination. (Citations omitted) p. 1429
>
> Because the district court's unchallenged findings established that Irby was the victim of retaliation in violation of section 704(a), we must hold that a viola-

> tion of section 1981 has also been established. Thus, although Title VII may not provide the source of a claim of retaliatory discharge under section 1983, section 1981 may. The district court erred in denying Irby's claim under sections 1981 and 1983 based on the absence of intentional racial discrimination. p. 1430

Since the Petitioner has alleged violations of substantive rights under § 1981 because his 1980 lawsuit and the instant lawsuit were based upon national origin discrimination, his claims under § 1983 must be allowed to stand. See also *Bradshaw v. Zoological Society of San Diego,* 569 F.2d 1066 (9th Cir. 1978) and *Huebschen v. Department of Health and Social Services,* 547 F.Supp. 1168 (W.D.Wis. 1982), *reversed and remanded on other grounds,* 716 F.2d 1167 (7th Cir. 1983). The District Court below concluded that in the absence of separate and independent facts other than those supporting the appellant's Title VII claims, claims under § 1981 and § 1983 could not be pursued. In *Ingram v. Madison Square Garden Center,* 482 F.Supp. 414 (S.D.N.Y. 1979) the Court stated:

> Unlike § 1985, § 1981 creates substantive rights which may be redressed in a federal court without regard to whether Title VII remedies are pursued or whether there has been compliance with Title VII jurisdictional prerequisites. The two statutes are completely independent, and a plaintiff can maintain both a Title VII and a § 1981 action arising out of the same set of facts. (Citations omitted)

See also *Zewde v. Elgin Community College,* 601 F.Supp. 1237 (N.D.Ill. 1984) where the Court held that the plaintiff may state a claim for deprivation of constitutional rights under § 1983 even though the facts underlying that

claim are essentially the same as those supporting the Title VII claim. The mere fact that the Petitioner's claims under § 1981 and § 1983 are based upon the same set of facts as his Title VII claim should not preclude from pursuing his remedies under these first two statutes.

CONCLUSION

For the reasons stated above, Petitioner requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 85-2219

ROBERT S. TAFOYA,

Plaintiff-Appellant,

v.

JAMES ADAMS, Individually and as Recreation Supervisor of the Department of Parks and Recreation for the City and County of Denver, and THE CITY AND COUNTY OF DENVER, a municipal corporation,

Defendants-Appellees.

Appeal from the United States District Court
For the District of Colorado
Order Granting Defendants-Appellees' Motion
For Partial Summary Judgment Dated July 8, 1985
(D.C. Civil Action No. 84-K-1535)

Paul A. Baca, Denver, Colorado, for Plaintiff-Appellant.
Geoffrey S. Wasson, Assistant City Attorney (Stephen H. Kaplan, City Attorney, with him on the brief), Denver, Colorado, for Defendants-Appellees.

Before LOGAN, BALDOCK, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

Robert S. Tafoya, a Mexican-American citizen of the United States, was terminated from his employment with the Department of Parks and Recreation for the City and County of Denver on January 20, 1984. On January 24, 1984, Tafoya filed a charge with the Equal Employment Opportunity Commission (EEOC). On April 30, 1984, the EEOC issued Tafoya a notice of right to sue. Tafoya then instituted the present proceeding in the United States District Court for the District of Colorado, naming as defendants James Adams, Tafoya's immediate supervisor in the Department of Parks and Recreation, and the City and County of Denver.

In his complaint, Tafoya sought relief under 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The district court granted the defendants partial summary judgment on Tafoya's § 1981 and § 1983 claims, the district court's Memorandum Opinion and Order appearing as Tafoya v. Adams, 612 F. Supp. 1097 (D. Colo. 1985). Thereafter, in a trial to the court, the district court entered judgment in favor of the defendants on Tafoya's Title VII claim. Tafoya now appeals the judgment dismissing his 1981 and 1983 claims. He does not appeal the adverse judgment suffered on his Title VII claim.

In paragraph 6 through 18 of the complaint, Tafoya sets forth the facts. In paragraphs 19 through 24, Tafoya sets forth his three claims for relief, one based on § 1981, a second on § 1983, and a third on Title VII. Each of the claims is based on the same operative facts set forth in paragraphs 6 through 18. From that statement of facts, we learn that Tafoya, a long time employee of the De-

partment of Parks and Recreation, filed a charge of discrimination with the EEOC in 1980, alleging that he was demoted from his Director II position because he was a Mexican-American. According to the complaint, however, this dispute was settled and it was agreed that Tafoya would be re-promoted to the next Director II vacancy, which he was on February 1, 1983.

After his reinstatement, Tafoya's immediate supervisor was James Adams. From the record it does not appear that Adams had anything to do with the 1980 charge of discrimination. However, Tafoya alleges in his complaint that very shortly after his re-promotion to Director II on February 1, 1983, Adams told him that he (Adams) was going to "get rid" of Tafoya because he (Tafoya) had filed the discrimination charge in 1980. Thereafter, according to the complaint, Adams embarked on a campaign to "get rid" of Tafoya, by doing such things as giving Tafoya poor job performance rating, causing Tafoya to be placed on probationary status, attempting to coerce Tafoya into resigning, causing dissension among the employees under Tafoya's supervision, and the like. On January 20, 1984, according to the complaint, Adams accomplished his goal when the Manager of Parks and Recreation terminated Tafoya's employment on Adams' recommendation.

In granting the defendants' motion for partial summary judgment and dismissing Tafoya's § 1981 and § 1983 claims for relief, the district court held that " . . . where an employee does not establish an independent basis and the §§ 1981 and 1983 claims are inherently bound up with the Title VII claim, Title VII constitutes the exclusive

remedy.'"[1] We affirm the judgment of the district court, but on a narrower ground, and hence do not need to here test the broader pronouncement of the district court.

The defendants' motion for summary judgment was filed after the defendants had answered the complaint. So far as we can ascertain from the record before us, there was nothing of an evidentiary nature before the court when the motion for summary judgment was considered and granted. Hence, we regard the motion for summary judgment as, in reality, a motion to test the sufficiency of the complaint.

The gist of Tafoya's complaint is that on January 20, 1984, the Manager of Parks and Recreation terminated his employment with the city on the recommendation of his supervisor, James Adams, and that the termination was in retaliation for Tafoya's filing of discrimination charges four years earlier. We have studied the complaint carefully, and we find no language which even suggests that in bringing about the termination of Tafoya's employment with the city, Adams or anyone else was motivated by discriminatory animus based on race or other "non-white" status.[2]

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[1] Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. *Id.*

[2] The City and County of Denver is a municipal corporation and can only act by and through its representatives. James Adams is the only individual named as a party defendant and

(Continued on following page)

We are aware that the district court in its Memorandum Opinion and Order stated that the complaint indicates that Tafoya was discharged in retaliation, and "there might also have been some discrimination involved with this termination." We find nothing in the complaint that would support the quoted language. On the contrary, there is nothing in the complaint that suggests race discrimination on the part of either Adams or any other representative of the city in connection with Tafoya's discharge. The gravamen of the complaint is retaliatory termination, nothing more.

42 U.S.C. § 2000e-3 provides, in part, that it is an unlawful employment practice for an employer to discriminate against one of his employees because the employee has opposed any practice made an unlawful employment practice by the Act or because the employee has filed a charge under the Act. Clearly, Tafoya has set forth in his complaint operative facts sufficient to charge retaliatory discharge under Title VII, although he was apparently unable to prove his charge upon trial of the matter.[3] The narrow question which remains is whether Tafoya in his complaint has set forth operative facts sufficient to support a claim under § 1981. We think he has not.

§ 1981, which prohibits discrimination based upon race, reads as follows:

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is the only person identified in the complaint. As indicated, the actual termination was made by the Manager of Parks and Recreation. However, that person is not identified, nor is there any suggestion that he, or she, was motivated by race animus.

[3] On July 12, 1985, following a trial to the court, the district court entered judgment for the defendants, dismissing Tafoya's Title VII action.

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall not be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

In Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979), we held that allegations by an employee that he was discriminated against by his employer because he was of Mexican-American descent and that he received treatment different from Anglos stated a cause of action under § 1981. We find nothing in the present complaint which would indicate, even obliquely, that Adams discriminated against Tafoya because he was Mexican-American or acted in a manner different than he would have acted if an Anglo had been involved.

In short, the complaint adequately sets forth a Title VII case based on retaliatory discharge, but does not allege a race discrimination claim under § 1981. In such circumstance, we need not here determine whether even if Tafoya had claimed race discrimination in connection with his retaliatory discharge his only remedy would still be under Title VII.[4] Having determined that Tafoya's complaint

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[4] Tafoya's allegation that he was fired in 1984 as retaliation for filing a discrimination charge in 1980 is not, in our view, the equivalent of an allegation that in 1984 his retaliatory discharge was motivated, at least in part, by race discrimination. *But, see* Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984), in which the court concluded that a § 1981 claim may be based on re-

(Continued on following page)

does not set forth a § 1981 claim, it follows that his §1983 claim also falls.[5] The right to be free of retaliatory discharge provided for by Title VII does not entitle one to relief under 1983 or 1985(3). Great American Fed. Sav. & Loan Ass'n. v. Novotny, 442 U.S. 366 (1979) and Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984).

In this general connection, see also Day v. Wayne County Bd. of Auditors, 749 F.2d 1199 (6th Cir. 1984). In *Day*, the district court found retalitory demotion on the part of the county, but, at the same time, found *no* dis-

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taliatory action taken in response to an employee's filing of an EEOC charge or civil rights lawsuit alleging racial discrimination. *Irby* at 1429, citing Goff v. Continental Oil Co., 678 F.2d 593, 598 (5th Cir. 1982). We prefer footnote 22 in *Irby*, wherein the court said that "[t]o establish a violation of section 1981, discriminatory animus based on race or other 'non-white' status ordinarily must be proven" (citing General Building Contractors v. Pennsylvania, 458 U.S. 375, 382-91 (1982)). The author of the *Irby* opinion further observed that it is "reasonably arguable, where racial animus is wholly lacking, that *Novotny* [Great American Fed. Sav. & Loan Ass'n. v. Novotny, 442 U.S. 366 (1979)] teaches that Title VII is the exclusive remedy for a retaliatory act taken against the filing of an EEOC complaint." *Irby* at 1430, n. 22.

[5] Section 1983, a remedial statute, provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1983 does not create any substantive rights; rather, it creates only a remedy for violations of rights secured by federal statutory and constitutional law. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 616-18 (1979).

crimination based on either age or race. Accordingly, the district court granted the plaintiff relief under Title VII, but denied relief under § 1981 or § 1983. On appeal the Sixth Circuit affirmed. In so doing, the Sixth Circuit concluded that the plaintiff had abandoned his § 1981 claim, but held that the district court did not err "in dismissing the plaintiff's § 1983 action when the only unlawful act proven by the plaintiff was violation of the provision of Title VII which makes it illegal for an employer to retaliate for an employee's charges of discrimination." *Day* at 1205.

Judgment affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 84-K-1535

ROBERT S. TAFOYA,

Plaintiff,

v.

JAMES ADAMS and the CITY AND COUNTY OF DENVER,

Defendants.

MEMORANDUM OPINION AND ORDER

KANE, J.

Plaintiff is a Mexican-American citizen of the United States. In 1980, while employed by the Parks and Recreation Department of the City and County of Denver, he filed a charge of discrimination with the Equal Employment Opportunity Commission. After this claim was settled, his supervisor, James Adams, allegedly told plaintiff he was going to "get rid" of him for having filed a charge of discrimination. Plaintiff claims that Adams then engaged in a course of conduct in retaliation for plaintiff's previous charge of discrimination which led to plaintiff's termination on January 20, 1984.

After being terminated, plaintiff filed yet another charge of discrimination with the EEOC. Upon receiving a "Right to Sue" letter, he brought the present action seeking recovery pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983.

The case is before me on defendants' motion for partial summary judgment. Defendants seek a dismissal of the §§ 1981 and 1983 claims against defendant City and County of Denver and a dismissal of the § 1983 claim against defendant Adams. The first question raised by defendants' motion is one of first impression in the Tenth Circuit: whether Title VII provides the exclusive cause of action which may be pursued in federal courts to remedy alleged violations of rights set forth in Title VII, by state and local governments, thereby precluding relief under §§ 1981 and 1983.

Congress enacted Title VII of the Civil Rights Act of 1964 to prohibit discriminatory employment practices on the basis of race, color, religion, sex, or national origin. Title VII provides for a detailed and explicit regulatory scheme. In an attempt to resolve disputes through voluntary compliance, Congress empowered the EEOC to investigate charges of discrimination, promote voluntary conciliation with the requirements of Title VII, and institute civil actions against private entities engaging in employment discrimination.

An aggrieved employee must first file a claim with a state or local employment commission or the EEOC. The statute precludes immediate filing of judicial proceedings in order to encourage conciliation through administrative mechanisms. The EEOC, however, possesses no direct enforcement capacity and must request federal courts to issue injunctive orders and order affirmative relief.

A Title VII suit may be filed by either the EEOC or aggrieved individuals themselves. The time limitations for administrative and judicial filings are limited to insure

expedited treatment of a plaintiff's case. Once in court, Title VII provides for injunctive relief, including back pay for a two year period. General and punitive damages are not recoverable. The Act specifically provides for the prevailing party to recover attorney fees. Finally, because of the expedited nature of Title VII judicial proceedings, as well as the limitation to equitable relief, and legislative emphasis on conciliation as distinguished from litigation, there is no right to trial by jury.[1] 42 U.S.C. § 2000e-5; *Great Am. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372-75, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed. 2d 147 (1974).

Section 1981 prohibits discrimination based upon race.[2] It provides remedies as well as substantive rights. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). Section 1983, on the other hand, does not create substantive rights. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 616-18, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). It provides a remedy for the violation of rights created elsewhere.[3] As the Supreme Court made clear in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), § 1983 provides a remedy for actions under color of law which contravene federally protected rights, whether those rights derive from the Constitution or from a federal statute. Thus, independent of Title VII remedies, §§ 1981 and 1983 both provide remedies for racial discrimination by state officials in violation of the Fourteenth Amendment. *See, e.g., Hazelwood School District v. United States*, 433 U.S. 299, 310 n. 15, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

The procedural requirements of §§ 1981 and 1983 are quite different from those of Title VII. To assert a claim under §§ 1981 or 1983, a plaintiff need not exhaust available administrative remedies. *Patsy v. Board of Regents of State of Florida,* 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). In Colorado, §§ 1981 and 1983 are subject to a three year statute of limitations, rather than the Title VII requirements that claims be filed with the EEOC within 180 days "after the alleged unlawful employment practice occurred" and with a federal district court within 90 days of the issuance of the "Right to Sue" letter. 42 U.S.C. §§ 2000e-5(e) and 2000e-(5)(f)(1); *McKay v. Hammock,* 730 F.2d 1367, 1370 (10th Cir. 1984); *E.E.O.C. v. Gaddis,* 733 F.2d 1373, 1377 (1984); *see also Wilson v. Garcia,* 471 U.S. —, 107 S.Ct. —, 85 L.Ed.2d 254 (1985). Additionally, remedies under §§ 1981 and 1983 are more expansive than under Title VII. Under §§ 1981 and 1983, a plaintiff may obtain both equitable and legal relief, including compensatory and punitive damages. *See Johnson,* 421 U.S. 454, 459-60; *Carey v. Piphus,* 435 U.S. 247, 256-57 n.11, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

II.

Discrimination in employment is actionable under the terms of §§ 1981 and 1983 as well as Title VII, and plaintiffs often allege violations of each based upon the same incident. The disparity in the remedies and procedural requirements between these statutes has caused considerable confusion and difficulty. Specifically, if violations of Title VII could be asserted through other, less restrictive statutes, such as §§ 1981 and 1983, the administrative process under Title VII could be completely bypassed.

Also, the complainant could obtain remedies and procedural benefits not provided for by Title VII such as punitive damages and a jury trial.

In *Brown v. General Services Admin.*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), the United States Supreme Court expressed this concern as follows:

> The balance, completeness, and structural integrity of § 717 [of Title VII] are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief . . . Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." Preiser v. Rodriguez, 411 U.S. 475, 489-90, 36 L.Ed.2d 439, 93 S.Ct. 1827 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

Brown, 425 U.S. 820, 832-33. The Court concluded that, in the 1972 amendment to § 717 of Title VII, which deals only with federal employees, Congress intended "to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." 425 U.S. 820, 829. Accordingly, the court held that a federal employee claiming job discrimination may proceed only under Title VII, and may not secure additional

remedies by proceeding also under § 1981. 425 U.S. 820, 835.

Similarly, in *Novotny,* the Court held that "deprivation of a right created by Title VII cannot be the basis for a cause of action under [42 U.S.C.] § 1985(c)." 442 U.S. 366, 378. The Court reasoned that such a § 1985(c) action would avoid the comprehensive procedural and remedial purposes of Title VII:

> If a violation of Title VII could be asserted through § 1985(c), a complainant could avoid most if not all of these detailed and specific provisions of the law. Section 1985(c) expressly authorizes compensatory damages; punitive damages might well follow. The plaintiff or defendant might demand a jury trial. The short and precise time limitations of Tile VII would be grossly altered. Perhaps most importantly, the complainant could completely bypass the administrative process, which plays a crucial role in the scheme established by Congress in Title VII.

Novotny, 442 U.S. 366, 375-76.

Additionally, in other contexts, the Court has held that § 1983 claims are precluded where another comprehensive statute is violated and provides a remedy. For example, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), the Court held that the existence of the express remedies in the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 et seq., demonstrates that Congress intended to supplant any remedy that otherwise might be available under § 1983. 453 U.S. 1, 19-20. The Court reasoned that

> [w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983. As Justice Stewart, who later joined the majority in Maine v. Thiboutot, stated in Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 673 n. 2, 60 L.Ed.2d 508, 99 S.Ct. 1905 (1979) (dissenting opinion), when "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983."

Sea Clammers, 453 U.S. 1, 20.

Also, in *Smith v. Robinson*, — U.S. —, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), the Court determined that Congress intended the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400 et seq., "to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." 82 L.Ed.2d 746, 763. Also in *Sea Clammers*, the Court found that

> The EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations. . . . Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims . . . to pursue those claims through the carefully tailored administrative and judicial mechanisms set out in the statute.

Smith, 82 L.Ed.2d 746, 763.

While these decisions do not directly address the issue in the present case, their import and reasoning are clear. Title VII is a comprehensive and detailed statutory scheme which provides specific remedies for rights created therein. To allow assertion of rights created by Title VII in a claim

brought under another statute would be to subvert this comprehensive statutory scheme. Certainly, Congress did not intend this result. The legislative history, however, regarding the inclusion of state and local employees within the protection of Title VII indicates that Congress did not intend to preclude them from bringing §§ 1981 and 1983 claims completely.

Federal and state employees were brought under Title VII by the Equal Employment Opportunity Act of 1972, P. L. 92-261, 86 State. 111. The House bill was passed in lieu of the Senate bill, so I turn to the House Committee Report for guidance as to congressional intent. I quote from the committee report at length, because the context of the committee's concern with pre-empting § 1983 is important to understanding the scope of Title VII.

> While an individual has a right of action in the appropriate court if he has been discriminated against, the adequacy of protection against employment discrimination by state and local governments has been severely impeded by the failure of the Congress to provide *Federal administrative machinery* to assist the aggrieved employee.
>
> . . .
>
> [S]tate and local governments constitute the only large group of employees in the nation who are almost entirely exempt from Federal nondiscrimination protections. Although the aggrieved individual may enforce his rights directly in the Federal district courts, this remedy . . . is frequently an empty promise due to the expense and time involved in pursuing a Federal court suit.
>
> . . .
>
> The Committee feels that it is an injustice to provide employees in the private sector with an *adminis-*

> *trative forum* in which to redress their grievances while at the same time denying similar protection to the increasing number of state and local employees. Accordingly, H.R. 1746 provides the *administrative remedies* available to employees in the private sector should also be extended to state and local employees.
>
> In establishing the applicability of Title VII to State and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected. . . . Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination . . .[T]he remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive. The bill, therefore, by extending jurisdiction to State and local government employees does not affect the existing rights that such individuals have already been granted by previous legislation.

H.R. Rep. No. 238, 92nd Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News 2137, 2153-54 (1972) (emphasis added). The Committee then noted that Title VII was designed as a means to remedy discrimination prohibited by the Thirteenth and Fourteenth Amendments. The Committee continued:

> Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the Committee believes that an appropriate remedy has been fashioned in the bill. Inclusion of state and local employees among those enjoying the protection of Title VII provides an *alternate administrative remedy* to the existing prohibition against discrimination perpetuated

> "under color of state law" as embodied in the Civil Rights Act of 1871, 42 U.S.C. § 1983.

H.R. Rep. No. 238, 92nd Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News 2137, 2154 (1972) (emphasis added).

As indicated by the legislative history, Congress' primary concern in bringing state and local employees under Title VII was to provide these individuals with access to the federal administrative scheme designed to combat employment discrimination. Clearly, Congress intended to permit individuals to pursue concurrently administrative options under Title VII and judicial remedies under §§ 1981 and 1983.

The legislative history, however, does not indicate whether Congress intended to permit the concurrent assertion of Title VII claims with §§ 1981 and 1983 claims in a single judicial proceeding. As noted above, when §§ 1981 and 1983 claims are brought in the same action as the Title VII claim, asserting violations of rights created by Title VII, the limited procedures and remedies of Title VII are subverted. It is inconsistent with the general statutory scheme of Title VII to permit the consideration of Title VII claims and §§ 1981 and 1983 claims based upon Title VII in the same lawsuit in federal court.[4]

Plaintiffs, however, may assert violations of other statutes, such as §§ 1981 and 1983, along with a Title VII claim in the same judicial proceeding as long as the other claims are independent and are not based on violations of rights set forth in Title VII. This critical distinction has been maintained by a majority of the courts which have addressed the question presented in this case. *See Rivera*

v. City of Wichita Falls, 665 F.2d 531, 534 n. 4 (5th Cir. 1982); *Day v. Wayne County Board of Auditors,* 749 F.2d 1199 (6th Cir. 1984); *Talley v. City of DeSoto,* 37 Fair Empl. Prac. Cases 375 (N.D.Tex. 1985); *Green v. Illinois Dept. of Transportation,* — F.Supp. —, No. 84-C-7081 (E.D.Ill. March 5, 1985); *Ratliff v. City of Milwaukee,* — F.Supp. —, No. 81-C-1407 (E.D.Wisc. May 9, 1985); *Torres v. Wisconsin Dept. of Health & Social Svcs.,* 592 F.Supp. 922 (E.D.Wisc. 1984); *Zewde v. Elgin Comm. College,* 601 F.Supp 1237 (W.D.Wisc. 1982); *cf. Heubschen v. Department of Health & Social Svcs.,* 547 F.Supp. 1168 (W.D.Wisc. 1982), *rev'd on other grounds,* 716 F.2d 1167 (7th Cir. 1983).

In *Day,* for example, the Sixth Circuit held that "Title VII provides for the exclusive remedy when the only § 1983 cause of action is based on a violation of Title VII." 749 F.2d 1199, 1204. The court, after considering the legislative history set forth above, stated that "we do not read this language as expressing an intent that where employer conduct violates only Title VII, which created new rights and remedies for public employees, an aggrieved employee may sue under both Title VII and § 1983. *Day,* 749 F.2d 1199, 1204-1205. In other words, where an employee does not establish an independent basis and the §§ 1981 and 1983 claims are inherently bound up with the Title VII claim, Title VII constitutes the exclusive remedy. *See Torres,* 592 F.Supp. 922, 930 (plaintiff's so-called constitutional allegations are so tied up with their cause of action under Title VII as to be nearly unidentifiable as discrete claims); *see also Ratliff,* — F.Supp. —; *Green,* — F.Supp. —.

III.

This gives rise to the second question upon the defendant's motion for partial summary judgment: whether

plaintiff's claims under § 1981 and 1983 are premised upon his claim under Title VII.

Defendants have moved for a partial summary judgment on this issue. Summary judgment is a drastic remedy. The Tenth Circuit has cautioned that any relief pursuant to Fed.R.Civ.P. 56 should be applied with care. *Jones v. Nelson,* 484 F.2d 1165, 1168 (10th Cir. 1973). The burden is on the moving party to show the absence of a genuine issue of material fact. Pleadings and factual issues of material fact must be viewed in the light most favorable to the party opposing summary judgment. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Rea v. Wichita Mortg. Corp.,* 747 F.2d 567, 573 (10th Cir. 1984). Unless the moving party can demonstrate his entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddell,* 620 F.2d 1375, 1381 (10th Cir. 1980). However, a party opposing summary judgment may not rest on allegations contained in pleadings to rebut the movant's factual proof in support of the motion for summary judgment. The party opposing the motion must respond with specific facts demonstrating genuine issues requiring resolution at trial.

Defendants contend that there is no distinction between plaintiff's Title VII claim and his claims under §§ 1981 and 1983, and therefore, the §§ 1981 and 1983 claims should be dismissed. Plaintiff fails to address this contention. Plaintiff's complaint merely alleges violations of each of these statutes. The facts set forth in the complaint, construed most favorably to the plaintiff, indicate that plaintiff may have been terminated in retaliation for filing a previous discrimination charge and there might also have been some discrimination involved with this termination.

These factual allegations, if proved, would come under the specific terms of Title VII. See 42 U.S.C. § 2000e-3(a). For the reasons stated above, Title VII would therefore provide the exclusive remedy unless plaintiff alleges an independent basis for his § 1981 and 1983 claims. Yet, nowhere does plaintiff assert an independent basis for these claims.[5] In fact, these claims are indistinguishable from plaintiff's Title VII claim. Accordingly, Title VII constitutes the exclusive remedy in this case. Defendants' motion for partial summary judgment, to dismiss plaintiff's §§ 1981 and 1983 claims, is granted as to defendant City and County of Denver.

IV.

Defendants' final contention is that plaintiff's § 1983 claim against defendant John Adams, plaintiff's supervisor, should be dismissed. Defendants argue that plaintiff's § 1983 claim is based entirely upon a violation of Title VII, and that, since defendant Adams is not amenable to an action under Title VII, plaintiff cannot thereby bring a claim against him under § 1983. In support of this contention, defendants cite the Seventh Circuit's opinion in *Heubschen,* 716 F.2d 1167.

In *Heubschen,* the plaintiff brought an action against his employer and supervisor, under Title VII and § 1983, for sexual harassment. The trial court held that the plaintiff could maintain an action against his supervisor under § 1983 based upon Title VII. 547 F.Supp. 1168, 1174. The Seventh Circuit, however, reversed, stating that "a plaintiff cannot bring an action under section 1983 based upon Title VII against a person was could not be sued directly under Title VII." 716 F.2d 1167, 1170. Here, the court determined that the plaintiff could not have maintained

an action against his supervisor under Title VII because she was not an "employer" within the meaning of § 703(a)(1) of Title VII. The court went on to state that

> [t]he effect of allowing a plaintiff to bring an action under section 1983 based upon Title VII against a defendant who could not be sued directly under Title VII would be to enlarge the relief available to one bringing an action for a violation of Title VII. Plaintiffs proceeding under section 1983 for violations of Title VII would obtain a substantive enlargement of the latter if they were able to sue a class of persons immune from actions brought directly under Title VII.

Heubschen, 716 F.2d 1167, 1170.

In the present case, it must first be determined whether defendant Adams is immune from a Title VII action. Defendants maintain that Adams is not an "employer" and is therefore not subject to Title VII. Under Title VII, "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . , *and any agent of such a person*. . . . 42 U.S.C. § 2000e(b) (emphasis added). While defendant Adams is not "a person . . . who has fifteen or more employees", he is admittedly an "agent of such a person." Officials and supervisors having responsibility and power to employ personnel and to control their conditions of employment have been held subject to Title VII. *See, e.g., Owens v. Rush*, 636 F.2d 283 (10th Cir. 1980); *Gay v. Board of Trustees*, 608 F.2d 127 (5th Cir. 1979); *Goodman v. Board of Trustees*, 511 F.Supp. 602 (N.D.Ill. 1981); *Kelly v. Richland School Dist. 2*, 463 F.Supp. 216 (D.S.C. 1978); *Manley v. Mobile County, Ala.*, 441 F.Supp. 1351 (S.D.Ala. 1977); *Padilla v. Stringer*, 395 F.Supp. 495 (D.N.M. 1974); *Byron v University of Florida*, 403 F.Supp. 49 (N.D.Fla. 1975); *Schaefer*

v. Tannian, 394 F.Supp. 1128 (E.D.Mich. 1974); *Compton v. Borden,* Inc., 424 F.Supp. 157 (D.Ohio 1976); *Curran v. Portland Superintending School Committee,* 435 F.Supp. 1063 (S.D.Maine 1977); *Jeter v. Boswell,* 554 F.Supp. 946 (D.W.Va. 1983).

In *Owens,* for example, the Tenth Circuit held that the "county sheriff is an agent of the [employer] county for all matters properly committed to his discretion—including the hiring and firing of employees." 636 F.2d 283, 287. Accordingly, the court found that the sheriff was subject to liability under Title VII. In *Padilla,* the district court found that the director of the Albuquerque zoo was an agent of the city within the meaning of § 2000e(b). The court stated that "an individual employee of an employer can be sued for participating in the managerial decisions that constituted alleged discriminatory conduct." 395 F.Supp. 495, 497.

In the present action, defendant Adams is a Recreation Supervisor for the Department of Parks and Recreation for the City and County of Denver. Plaintiff alleges, in his complaint, that Adams "engaged in a campaign to accomplish his termination." Plaintiff also asserts that the City and County of Denver, through its Manager of Parks and Recreation, followed Adams' recommendation that plaintiff be terminated. While Adams may not have the direct power to hire and fire personnel, he participated in such managerial decisions. Adams also had control over plaintiff's employment conditions.

Given Adams' position and responsibility in the Parks and Recreation Department, he is an "agent" of the city for purposes of 2000e(b). Accordingly, defendant Adams is an "employer" subject to the terms of Title VII.

Since Adams is subject to Title VII, plaintiff's §§ 1981 and 1983 claims against him cannot be dismissed for the reason stated in *Heubschen*. However, as with the §§ 1981 and 1983 claims against the city, the §§ 1981 and 1983 claims against Adams do not have an independent basis. Therefore, these claims must be dismissed as against defendant Adams.

IT IS THEREFORE ORDERED that:

Defendants' motion for partial summary judgment is GRANTED. Plaintiff's §§ 1981 and 1983 claims against both defendants are dismissed.

DATED at Denver Colorado this 8th day of July, 1985.

/s/ John L. Kane, jr.
United States District Judge

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[1] In order to expedite employment discrimination claims in federal courts, 42 U.S.C. § 2000e-5(f) makes special provision for appointment of a master to hear Title VII cases. If a Title VII case is joined with a claim under §§ 1981 or 1983, which could be tried to a jury, assignment to a master is less practicable if not prohibited. *See* Fed.R.Civ.P. 53.

[2] 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property that is enjoyed by white persons, and shall be subject to like punishment, pains, penalties, taxes, licenses, and extraction of every kind, and to no other.

[3] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

(Continued from previous page)

(Continued on following page)

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[4] Plaintiff argues that the language in *Johnson*, 421 U.S. 454, controls and that Title VII is not the exclusive remedy. In *Johnson*, the Court stated that "[d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possessed and is not limited to Title VII in his search for relief." 421 U.S. 454, 459. The Court's statement does not negate the requirement that the plaintiff establish an independent basis for his additional claims.

Plaintiff also argues that my decision in *Firefighters Inc. for Racial Equality v. Bach*, 522 F.Supp. 1120 (D.Colo. 1981), *rev'd*, 731 F.2d 664 (10th Cir. 1984), and Judge Carrigan's opinion in *Whatley v. Skaggs Companies, Inc.*, 502 F.Supp. 370 (D. Colo. 1981), *aff'd in part and remanded in part*, 707 F.2d 1129 (10th Cir. 1982), *cert. denied*, 104 S.Ct. 3349 (1983), provide that a state employee could pursue concurrent judicial claims for employment discrimination under Title VII and §§ 1981 and 1983. These cases are not applicable. In *Firefighters*, I did not consider the issue before me now. Similarly, in *Whatley*, Judge Carrigan dealt with a different issue.

[5] This situation is unlike that presented in *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981), where the plaintiff alleged violations of independent substantive rights in addition to his Title VII claims.

APPENDIX C

IN THE UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-K-1535

ROBERT S. TAFOYA,

Plaintiff,

vs.

JAMES ADAMS, individually and as Recreation Supervisor of the Department of Parks and Recreation for the City and County of Denver and THE CITY AND COUNTY OF DENVER, a Municipal Corporation,

Defendants.

COMPLAINT

I. NATURE OF THE CLAIM

1. This is an action for declaratory relief, injunctive relief and damages to redress the deprivation of rights secured to the plaintiff by 42 U.S.C. § 1981, 42 U.S.C. § 1983 and 42 U.S.C. § 2000e *et seq.*

II. JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § § 1343(3) and (4) relating to actions under 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 2291 and 2202, relating to declaratory judgments, and 42 U.S.C. § 2000e-5(f).

III. PLAINTIFF

3. The plaintiff, Robert S. Tafoya, is a Mexican American citizen of the United States and is presently a resident and domiciliary of Denver, Colorado and a former employee of the Department of Parks and Recreation for the City and County of Denver.

IV. DEFENDANT

4. The defendant, James Adams, is a Recreation Supervisor for the Department of Parks and Recreation for the City and County of Denver and in that capacity had immediate supervisory responsibility over the plaintiff while the plaintiff was employed as a Recreation Center Director II with the Department of Parks and Recreation of the City and County of Denver.

5. The defendant, City and County of Denver is a municipal corporation created pursuant to Article 20 of the Colorado Constitution, and is an employer engaged in an industry affecting commerce who employs more than fifteen (15) persons and is an "employer" within the meaning of 42 U.S.C. § 2000e(b).

V. STATEMENT OF FACTS

6. The plaintiff began his employment with the Department of Parks and Recreation for the City and County of Denver (hereinafter "Department") and was continuously employed by the Department from that time up to the date of the termination of his employment on January 20, 1984. During this period of employment, the plaintiff held the position of Trainee, Sports Leader, Recreation Leader

and Director I and Director II, the position from which he was terminated on January 20, 1984.

7. In 1980 the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission against the Department and the City and County of Denver alleging that he was being discriminated against by agents of the Department regarding the terms and conditions of his employment because of his national origin, Mexican American.

8. The Equal Employment Opportunity Commission was unable to conciliate the plaintiff's charge of discrimination and the subject matter of the charge ultimately resulted in the filing of a lawsuit in the United States District Court for the District of Colorado. Through negotiations between the parties, the lawsuit was settled and part of the settlement agreement provided that the plaintiff would be reinstated to the position of Director II.

9. On February 1, 1983 the plaintiff was reinstated to the position of Director II under the direct supervision of defendant James Adams.

10. On April 27, 1983, defendant Adams had a conversation with the plaintiff at which time he advised the plaintiff that he was going to "get rid" of the plaintiff for having filed a charge of discrimination and a lawsuit against the Department and that he was going to use the plaintiff's performance evaluations to accomplish the plaintiff's termination.

11. From the date of the conversation between the defendant Adams on March 27, 1983 and continuing to the date of the plaintiff's termination on January 20, 1984, de-

fendant Adams engaged in a campaign to accomplish the plaintiff's termination which included but is not limited to the following:

a. Defendant Adams gave the plaintiff poor and unacceptable job performance ratings which were not commensurate with the plaintiff's actual job performance.

b. Defendant Adams caused the plaintiff to be placed on probationary status during this period thereby jeopardizing his employment with the Department.

c. Defendant Adams attempted to coerce the plaintiff into submitting his resignation from his employment with the Department.

d. Defendant Adams encouraged and created dissension amongst the subordinates of the plaintiff thereby obstructing the plaintiff's efforts to perform his assignments and duties in a satisfactory manner.

e. Defendant Adams orchestrated and coordinated the efforts of plaintiff's subordinates to bring false allegations concerning the plaintiff's conduct which ultimately resulted in the plaintiff's termination on January 20, 1984.

12. During the time of the plaintiff's reinstatment on February 1, 1983, to the position of Director II up to the date of the termination on January 20, 1984 the plaintiff performed his duties and responsibilities in a satisfactory manner.

13. The actions of defendant Adams against the plaintiff referred to above were intentional, willful, reckless and under color of law without regard to the rights of the plaintiff and were designed to accomplish the termina-

tion of the plaintiff from his employment with the Department.

14. On January 20, 1984 the City and County of Denver through its Manager of Parks and Recreation followed the recommendations of defendant Adams and terminated the plaintiff from his employment.

15. On January 24, 1984 the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission concerning his performance evaluations and the termination of his employment.

16. On April 30, 1984, the Equal Employment Opportunity Commission issued to the plaintiff a Notice of Right to Sue and this action has been timely filed in this Court from the date of the plaintiff's receipt of said Notice.

17. The plaintiff has been and is continuing to be denied his rights to equal employment opportunity and will continue to suffer harm unless the injunctive relief requested in this Complaint is granted.

18. The plaintiff has no plain, adequate or speedy remedy at law.

VI. FIRST CLAIM FOR RELIEF

19. Plaintiff incorporates and adopts paragraphs 1 through 18 of this Complaint.

20. As a result of the acts committed by the defendants, plaintiff will be continued to be denied his rights under 42 U.S.C. § 1981.

VII. SECOND CLAIM FOR RELIEF

21. Plaintiff incorporates and adopts paragraphs 1 through 18 of this Complaint.

22. As a result of the acts committed by the defendants, plaintiff has been and will continue to be denied his rights under 42 U.S.C. § 1983.

VIII. THIRD CLAIM FOR RELIEF

23. Plaintiff incorporates and adopts paragraphs 1 through 18 of this Complaint.

24. As a result of the acts committed by the defendants, plaintiff has been denied and will continue to be denied his rights under 42 U.S.C. § 2000e *et seq.*

IX. RELIEF

WHEREFORE, the plaintiff requests that this Court enter judgment against the defendant granting him the following relief:

A. A declaratory judgment declaring the acts of the defendants to be in violation of the plaintiff's to equal opportunity under 42 U.S.C. § 1981, 42 U.S.C. § 1983 and 42 U.S.C. § 2000e *et seq.*

B. An injunction requiring the defendants to reinstate the plaintiff to his formerly held position of Director II with retroactive benefits and seniority rights.

C. An injunction enjoining the defendants, their agents and those acting in concert with them or at their direction from continuing or maintaining any policy, prac-

tice, custom or usage of denying, abridging, withholding, conditioning, limiting, or otherwise interfering with the rights of plaintiff to equal employment opportunity.

D. An injunction enjoining the defendants, their agents, employees and those acting in concert with them or at their direction from engaging in any forms of harassment intimidation or coercion of the plaintiff because of his filing of the instant action or his filing of any administrative charges of discrimination with any government fair employment practices agencies.

E. An injunction enjoining the defendants, their agents and those acting in concert with them or at their direction from depriving the plaintiff of any promotional opportunities to better paying or more responsible positions as a result of his bringing this action or filing administrative charges of discrimination with any government fair employment practices and agencies.

F. An award of back pay to the plaintiff for the losses which he has suffered as a result of the defendant's unlawful employment practices including lost wages, prejudgment interest on lost wages, vacation benefits, sick leave benefits, life insurance benefits, medical insurance benefits, profit sharing benefits, pension benefits and any other monetary loss the plaintiff has incurred to which he would otherwise be entitled.

G. Compensatory damages in the amount of $100,000.00.

H. Punitive damages in the amount of $100,000.00.

I. An award of costs including a reasonable attorney's fee for the prosecution of this action.

J. Such other and further relief as this Court may deem just and proper.

/s/ Paul A. Baca
303 West Colfax Avenue
Suite 950
Denver, CO 80204
(303) 825-8594
ATTORNEY FOR PLAINTIFF

Plaintiff's Address:
2426 West Hillside Avenue
Denver, CO 80223

PLAINTIFF DEMANDS TRIAL BY A JURY OF SIX ON HIS 42 U.S.C. § 1981 and 42 U.S.C. § 1983 CLAIMS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-K-1535

ROBERT S. TAFOYA,

Plaintiff,

vs.

JAMES ADAMS, *et al.*,

Defendants.

PRETRIAL ORDER

I. DATE AND APPEARANCES

A Pre-Trial Conference has not been set in this matter. This Pre-Trial Order is submitted pursuant to the Order of the Court dated October 10, 1984. Paul A. Baca appears for the plaintiff. Geoffrey S. Wasson, Assistant City Attorney for the City and County of Denver appears for the defendants.

II. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(3) and (4) relating to actions under 42 U.S.C. § 1981 and § 1983, 28 U.S.C. § 2201 and § 2202 relating to declaratory judgments and 42 U.S.C. § 2000e-5(f). Jurisdiction is admitted.

III. CLAIMS AND DEFENSES

A. Plaintiff's Claims:

The plaintiff claims that he was discriminated against by the defendants regarding the terms and conditions of his

employment with the Department of Parks and Recreation for the City and County of Denver because of his national origin, Mexican-American, and because he had previously opposed employment practices which he reasonably believed to be unlawful. Specifically, the plaintiff claims that the defendants gave him poor and unacceptable job performance ratings which were not commensurate with his actual job performance; caused the plaintiff to be placed on probationary status thereby jeopardizing his employment; attempted to coerce the plaintiff into submitting his resignation from his employment; encouraged and created dissension amongst the subordinates of the plaintiff thereby obstructing his efforts to perform his assignments and duties in a satisfactory manner and terminated the plaintiff from his employment on January 20, 1984. The plaintiff's version of the facts are that he was reinstated to the position of Director II on February 1, 1983 under the supervision of defendant James Adams. The plaintiff previously held that position and was demoted which resulted in the filing of an action in the United States District Court for the District of Colorado in 1980 alleging discrimination based upon national origin. Shortly after his reinstatement to the position of Director II, the defendant was advised by his immediate supervisor, defendant Adams, that he was going to "get rid" of the plaintiff for having previously filed a charge of discrimination and a lawsuit against the Department of Parks and Recreation. From the date of that conversation to the date of his termination, the plaintiff performed his duties and responsibilities in a satisfactory manner. The plaintiff was terminated as a result of accusations of misconduct which the plaintiff denies.

The plaintiff seeks relief in the form of reinstatement to his formerly held position, back pay with interest, pun-

itive damages, compensatory damages, his costs including a reasonable attorney's fee and injunctive relief in the form of an injunction requiring the defendants and their agents from engaging in any further discrimination against him.

B. Defendants' Claims:

The defendants deny the plaintiff's allegations of discriminatory employment actions. The defendants claim that the plaintiff was terminated for cause and that the plaintiff's performance ratings were accurate appraisals of his performance.

IV. STIPULATIONS

A. Facts.

The parties stipulate to the following facts:

1. That the plaintiff is a Mexican-American citizen of the United States and is presently a resident of Denver, Colorado and a former employee of the Department of Parks and Recreation for the City and County of Denver.

2. That defendant James Adams is a Recreation Supervisor for the Department of Parks and Recreation and in that capacity had immediate supervisory responsibility over the plaintiff while the plaintiff was employed as a Recreation Center Director II.

3. That the City and County of Denver is an "employer" within the meaning of 42 U.S.C. § 2000e(b).

4. That the plaintiff was continuously employed by the Department of Parks and Recreation from 1970 up to the date of his termination on January 20, 1984.

5. That in 1980 the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Com-

mission alleging that he was being discriminated against regarding the terms and conditions of his employment because of his national origin and that the charge of discrimination resulted in the filing of a lawsuit in the United States District Court for the District of Colorado which lawsuit was settled.

6. That as a result of the settlement of the above-referenced lawsuit, the plaintiff was placed in the position of Recreation Center Director II on February 1, 1983.

7. That on January 24, 1984 the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission concerning his performance evaluations and the termination of his employment.

B. Evidence.

The parties have not reached any stipulations in regard to the evidence to be presented by both sides.

C. Applicability of Statutes.

The parties stipulate that the statutes applicable to the claims raised in this action are 42 U.S.C. § 2000e *et seq.* The applicability of 42 U.S.C. § 1981 and § 1983 has been contested by defendants in their Motion for Partial Summary Judgment.

V. PENDING MOTIONS.

The defendants have pending a motion for partial summary judgment to be decided before trial and said motion was filed by the defendants on February 15, 1985.

VI. WITNESSES.

A. Plaintiff's Non-Expert Witnesses.

The plaintiff will call the following non-expert witnesses:

1. Robert S. Tafoya.
2. Bobby S. Aragon.
3. Michael Maestas.
4. Alfonso Cisneros.
5. Cleophus Coulter.
6. Margarito Berzoza.
7. James Adams, as an adverse witness.
8. Martha Guevara, as an adverse witness.
9. Joe Ciancio, Jr., as an adverse witness.
9. Any witness listed by the defendants.
10. Any witness necessary for impeachment or rebuttal.

B. Plaintiff's Expert Witnesses.

1. W. Burcher.

C. Defendants' Non-Expert Witnesses.

1. James Adams.
2. Martha Guevara.
3. Eloy Mares.
4. Ricky Cisneros.
5. Juanita Espinosa.
6. Lydia Atencio.

7. Tina Garcia.
8. Ann Dougherty.
9. Any witness listed by plaintiff.
10. Any witness necessary for impeachment or rebuttal.

D. Defendants' Expert Witnesses.

1. None.

Written summaries of opinions of expert witnesses and a description of expert's qualifications must be provided to opposing counsel no later than thirty (30) days after the entry of the Pretrial Order. The names of any additional witnesses must be disclosed to opposing counsel within ten (10) days of their becoming known or their existence should have become known. In addition, a final written list of witnesses must be filed at the Status Conference referred to in Section XII(b).

VII. EXHIBITS.

A. Plaintiff will offer the following exhibits at trial:

1. Plaintiff's performance evaluation dated April 27, 1983.

2. Interoffice Correspondence from Jim Adams to Robert Tafoya dated May 13, 1983.

3. Interoffice Correspondence from Joe Ciancio, Jr. to Robert Tafoya dated May 17, 1983.

4. Interoffice Correspondence from David Thibault and James Adams to A.H. Abshire dated July 12, 1983.

5. Memorandum from A.H. Abshire to David Thibault dated July 18, 1983.

6. Authorization for Leave concerning Margarito Berzoza for the period August 8, 1983 to August 12, 1983.

7. Authorization for Leave concerning Margarito Berzoza for the period August 15, 1983 to August 19, 1983.

8. Attendance Report of Margarito Berzoza for the period ending August 15, 1983.

9. Attendance Report for Margarito Berzoza for the period ending August 31, 1983.

10. Plaintiff's personal attendance records for the month of August, 1983 for himself and his subordinates.

11. Memorandum from A.H. Abshire to Martha E. Gavara dated Ocober 13, 1983.

12. Interoffice Correspondence from Jim Adams to Robert Tafoya dated October 27, 1983.

13. Interoffice Correspondence from Martha E. Guevara to Robert Tafoya dated October 28, 1983.

14. Letter from Recreation Staff of La Familia Recreation Center to Martha E. Guevara dated November 14, 1983.

15. Letter of Dismissal from Martha E. Guevara to Robert S. Tafoya dated January 20, 1984.

16. Charge of discrimination filed by the plaintiff with the Equal Employment Opportunity Commission on January 24, 1984.

17. Notice of Right to Sue dated April 30, 1984.

18. Delivery notice or receipt No. P423793430.

19. Letter from W. Burcher to Robert Tafoya dated January 30, 1984.

20. Income tax return of the plaintiff for the year 1984.

21. Wage information showing wages earned by the plaintiff from January 1, 1985 up to the date of trial.

22. Computation of wages which the plaintiff would have earned from January 20, 1984 up to the time of trial.

23. Any exhibit listed by the defendants.

24. Any exhibit necessary for impeachment or rebuttal.

B. Defendants' Exhibits.

1. Personnel Rules of the Career Service Authority.

2. Personnel files of the plaintiff.

3. Reporter's transcript of hearings conducted before the Hearings Officer of the Career Service Authority.

Copies of exhibits must be provided to opposing counsel no later than the Status Conference referred to in Section XII(b).

VIII. DISCOVERY.

Discovery has been completed.

IX. SPECIAL ISSUES.

The plaintiff intends to offer testimony of a polygraph examiner which the Court may wish to consider prior to trial. The Court may also wish to consider the admissibility of the settlement documents in Civil Action No. 81-Z-1379.

X. OFFER OF JUDGMENT.

Counsel acknowledge familiarity with the provisions of Rule 68, Federal Rules of Civil Procedure (Offer of Judg-

ment) and have discussed it with the clients against whom claims are made in this case.

XI. EFFECT OF PRETRIAL ORDER

(a) Counsel acknowledge familiarity with the provisions of Rule 16, Federal Rules of Civil Procedure (Pre-Trial Procedure; Formulating Issues).

(b) Hereafter, this Order will control the subsequent course of this action and the trial and may not be amended except by consent of the parties and approval by the Court or by Order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this Order, reference may be made to the records of the Pretrial Conference to the extent reported by stenographic notes and to the pleadings.

XII. TRIAL AND ESTIMATED TRIAL TIME; STATUS CONFERENCE.

(a) Trial of the plaintiff's claims under 42 U.S.C. § 1981 and § 1983 will be tried to a jury. Plaintiff's claims under 42 U.S.C. § 2000e *et seq.* will be tried to the Court. Plaintiff's counsel estimates that two days of trial time will be required.

Defense counsel feels that two days is insufficient. Defense counsel estimates four days to try this case to a jury.

(b) A Status Conference will be held by the Court no later than thirty (30) days before the trial date. At this Status Conference counsel are directed to file final lists of all exhibits and witnesses. The Court may also consider motions in limine, if any, on particular issues and other matters to expedite the trial.

DATED this 3rd day of April, 1985.

BY THE COURT:
—Original Signed—
UNITED STATES DISTRICT JUDGE

Pre-Trial Order Approved:

—Original Signed—
PAUL A. BACA
303 West Colfax, Suite 950
Denver, CO 80204
(303) 825-8594
ATTORNEY FOR PLAINTIFF

—Original Signed—
GEOFFREY S. WASSON
Assistant City Attorney
1445 Cleveland Place, Room 303
Denver, CO 80202
(303) 575-2931
ATTORNEY FOR DEFENDANTS

APPENDIX E

42 U.S.C. § 2000e-2(e). Discrimination because of race color, religion, sex, or national origin

(a) *Employers.* It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) *Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing.* It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or par-

ticipated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17].

42 USCS § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress, applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-124

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

ROBERT S. TAFOYA,
Petitioner,

vs.

JAMES ADAMS, et. al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Stephen H. Kaplan
City Attorney

Geoffrey S. Wasson
Assistant City Attorney

1445 Cleveland Place
Room 303
Denver, Colorado 80202
(303) 575-2931

Attorneys for Respondents

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is it appropriate for this Court to consider the merits of of the District Court's Opinion and Order wherein the petitioner's claims under 42 U.S.C. § 1983 and § 1981 were dismissed on a motion for Summary Judgment.

2. Does the legislative history of the 1972 amendments to Title VII and the caselaw from this Court require that a Title VII plaintiff establish a basis for suit under 42 U.S.C. § 1983 and § 1981 which is independent of a violation of Title VII so that a claim under these civil rights statutes may be brought in the same proceeding with Title VII claims?

3. Did the petitioner here establish a basis for his claims under 42 U.S.C. §§ 1983 and 1981 which are independent of the employer's alleged commission of unlawful employment practices under Title VII.

4. Did the Court of Appeals err in determining that the petitioner failed to plead operative facts sufficient to support a claim under 42 U.S.C. § 1981?

LIST OF PARTIES

The respondents adopt the petitioner's statement contained in the petition for writ of *certiorari*.

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No. 87-124

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ROBERT S. TAFOYA,

Petitioner,

vs.

JAMES ADAMS, et. al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The respondents ask this Court to deny the petition for writ of certiorari whereby review would be taken of the April 21, 1987 judgment of the United States Court of Appeals for the Tenth Circuit in Tafoya, Plaintiff-Appellant, v. Adams, et al., Defendants-Appellees.

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The respondents adopt the petitioner's statement contained in the petition for writ of *Certiorari.*

JURISDICTION

The respondents adopt the petitioner's statement with respect to the jurisdictional basis for the writ of *certiorari* set forth in the petition for writ of *certiorari.*

STATUTES INVOLVED

The respondents adopt the petitioner's citations of the relevant statutes and supplement the same with an additional statement with respect to the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. 2000e. The respondents are providing Sections 701, 702, 703 and 704 of Title VII, 42 U.S.C. 2000e thru 2000e-3, which is set forth in Appendix A to this brief in opposition.

STATEMENT OF THE CASE

The respondents adopt the petitioner's statement of the case set forth in the petition for writ of *certiorari*.

REASONS FOR DENYING THE WRIT

The merits of the decision of the District Court dismissing the petitioner's claims under 42 U.S.C. § 1983 and § 1981 should not be reached by this Court. The merits of the decision of the district court can not be resolved by the straightforward application of controlling precedent. The legislative history preceding the 1972 amendments to Title VII and the case law from this Court requires that claims under 42 U.S.C. § 1983 and § 1983 have an independent basis from an asserted violation of Title VII because an employer committed an unlawful employment practice. The respondents will demonstrate that the claims asserted under § 1983 and § 1981 do not have a viable basis independent of the asserted violation of Title VII. The petitioner's complaint does not set forth operative facts which are sufficient to support claims under 42 U.S.C. § 1983 or § 1981.

I.

The respondents do not dispute that the merits of the District Court's order dismissing the petitioner's claims under 42 U.S.C. § 1983 and § 1981 were argued and briefed in the District Court and in the Court of Appeals. However the resolution of the issue presented below and not reached by the Court of Appeals can not be decided by a simple and "straightforward application

of controlling precedent." *Thigpen* v. *Roberts,* 468 U.S. 27, 33, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984). The petitioner's assertion that review should be granted "... because (of) the confusion, conflict and mixed signals on this question in the decisions of the circuit courts ..." demonstrates the lack of "controlling precedent" that can be applied in a straightforward fashion to resolve an important issue of substance. See the petition for writ of *certiorari,* p. 6.

II.

This Court has held that §1983 does not itself create substantive rights. *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 616-18, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979).

In *Great American Fed. S. & L. Association v. Novotny,* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) this Court addressed the question of whether a retaliatory discharge in violation of Section 704(e) of Title VII (42 U.S.C. 2000e-3(a)) could become the basis for a violation of 42 U.S.C. § 1985(3). This Court noted that "(s)ection 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Novotny,* at 442 U.S. 372. This Court held that a "...deprivation of a right created by Title VII cannot be the basis for a cause of action under 1985(3)," *Novotny,* at 442 U.S. 378. This Court's holding was premised in part upon a finding that an action under § 1985(3) would allow a plaintiff to avoid the comprehensive procedural remedial purposes of Title VII.

This Court has examined the interplay between § 1983 and other more specific remedial statutes and concluded that the cause of action is confined to the more precise statutes. In *Preiser* v. *Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) this Court held that where a statute provides a particular procedure and an exclusive remedy for violation of the statute, § 1983 may not be used to obtain additional remedies. In *Middlesex County Sewage Authority* v. *Sea Clammers,* 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), this Court held that the detailed scheme and particular remedies written into the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et. seq.* and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401, *et. seq.* precluded the simultaneous invocation of 1983.

In *Smith* v. *Robinson,* 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed. 2d 746 (1984), this Court held that the Education of the Handicapped Act, 20 U.S.C. § 1400, *et. seq.* (EHA) precluded the assertion of equal protection claims which were virtually identical to the EHA claims. This Court in *Smith* observed that it will not lightly determine that Congress intended to foreclose reliance on § 1983 for substantial federal claims, but that Congress does have the authority to replace a § 1983 cause of action with regard to particular rights by providing an exclusive remedy elsewhere. The legislative history of the 1972 amendments to Title VII demonstrate that Congress intended to limit reliance on both § 1983 and § 1981 claims of discrimination in the employment setting.

Title VII as enacted in 1964 only applied to the private sector. Public sector employers such as respondent Denver became subject to Title VII when it was amended in 1972. The legislative history preceding the 1972 amendments to Title VII discussed the interplay between Title VII and 42 U.S.C. § 1981 and § 1983. The House Committee Report addressed the need to bring state and local governments within the ambit of Title VII stating:

> While an individual has a right of action in the appropriate court if he has been discriminated against, the adequacy of protection against employment discrimination by state and local governments has been severely impeded by the failure of the Congress to provide Federal administrative machinery to assist the aggrieved employee.
>
> ...
>
> State and local governments constitute the only large group of employees in the nation who are almost entirely exempt from Federal nondiscrimination protections. Although the aggrieved individual may enforce his rights directly in the Federal district courts, this remedy ... is frequently an empty promise due to the expense and time involved in pursuing a Federal court suit.
>
> ...
>
> The Committee feels that it is an injustice, to provide employees in the private sector

> with an administrative forum in which to redress their grievances while at the same time, denying similar protection to the increasing number of state and local employees. Accordingly, H.R. 1746 provides the administrative remedies available to employees in the private sector should also be extended to state and local employees.

H. R. Rep. No. 238, 92nd Cong., 2nd Session *reprinted in* U.S. Code Cong. & Ad. News 2137, 2153-54 (1972). The House committee then directly addressed the impact of extending Title VII to state and local governments upon an individual's ability to maintain suit under §§ 1981 and 1983 stating:

> In establishing the applicability of Title VII to state and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected...
>
> Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination...The remedies available to the individual under Title VII *are co-extensive* with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that

the *two* procedures augment each other and are not mutually exclusive. The bill, therefore, by extending jurisdiction to State and local government employees does not affect the *existing rights* that such individuals have already been granted by previous legislation.

H. R. Rep. No. 238, 92nd Cong., 2nd Session, *reprinted in* U.S. Code Cong. & Ad. News 2137, 2154 (1972) (emphasis added).

Prior to the extension of Title VII to state and local governments in 1972, the governmental employee did not have any *existing rights* under Title VII. This congressional limitation of § 1981 and § 1983 suits to rights that existed prior to the inclusion of state and local governments would bar subsequent § 1981 and § 1983 suits which were premised upon the state or local governments alleged commission of unlawful employment practices prohibited by Title VII.

The legislative history quoted above demonstrates that Congress recognized that the extension of Title VII to state and local governments created new and additional statutory rights for employees in the public sector. The Congress took care to state that the inclusion of state and local governments within Title VII's ambit did not extinguish the *existing* rights that had been granted by previous legislation, 42 U.S.C §§ 1981 and 1983. The Congress clearly stated that the procedures under Title VII, § 1981, and § 1983 augment one another. The Congress stated that the statutory remedies are not mutually exclusive. Equally significant the legislative history does not state nor even suggest that the statutes are *mutually inclusive* nor does this

Court's analysis of the relationship between §§ 1983 and 1981 suggest that the statutes are mutually inclusive.

This Court has not addressed the question of whether a violation of Title VII is included within a claim brought under § 1981. This Court's examination of the interplay between Title VII and §§ 1981 and 1983 has focused on the question of whether Title VII excluded a cause of action under either §§ 1981 or 1983. This Court's treatment of the exclusion issue emphasizes the distinctions between Title VII and § 1981.

In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) this Court addressed the question of whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission tolled the running of the statute of limitations applicable to an action based upon the same facts instituted under § 1981. *Johnson,* at 421 U.S. 455. This Court stated that "(s)ection 1981 is not coextensive in its coverage with Title VII." *Johnson,* at 421 U.S. 460. This Court held that "the remedies under Title VII and under § 1981, although related and although directed to most of the same ends, are *separate, distinct,* and *independent.*" *Johnson,* at 421 U.S. 461 (emphasis added).

This Court earlier held that an employee's presentation of a discrimination claim to final arbitration under a non-discrimination clause of a collective bargaining agreement did not bar a later Title VII case. *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 38, 94

S.Ct. 1011, 39 L.Ed.2d 147 (1974). This Court recognized the "... distinctly separate nature of the *contractual* and *statutory rights* ..." in holding that the submission of a grievance to arbitration was a vindication of a contractual right under a collective bargaining agreement while the Title VII suit represented the assertion of independent statutory rights conferred by Congress with the enactment of Title VII. *Gardner-Denver,* at 415 U.S. 49-50 (emphasis added).

In *General Building Contractors Assn.* v. *Pennsylvania,* 458 U.S. 375, 383 S.Ct. 3141, 73 L.Ed. 2d 835 (1982), this Court refused to impose liability under the disparate impact analysis of Title VII articulated in *Griggs* v. *Duke Power Co.,* 41 U.S. 424, 430, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) in a case brought under 1981 without proof of intentional discrimination. This Court held that § 1981 could be violated only by showing of "purposeful discrimination." *General Building Contractors Assn.,* at 458 U.S. 391. This Court noted that Congress intended to protect a limited category of rights under 1981, specifically defined in terms of racial equality. *General Building Contractors Assn.,* at 458 U.S. 384. In deciding *General Building Contractors Assn.* this Court referred to *Runyon* v. *McCrary,* 427 U.S. 160, 170-171, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) where this Court had held that § 1981 would be violated "if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees." This Court's reference to *Runyon* v. *McCrary, supra,* emphasizes the contractual rights protected by § 1981 that were at issue in *General Building Contractors Assn.,*

supra. The Tenth Circuit has recognized that "Title VII and § 1981 are are not identical." *Manzanares* v. *Safeway Stores Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

These decisions where this Court has examined §§ 1981 and 1983 in conjunction with Title VII disclose that this Court clearly recognizes that a violation of Title VII without more does not become a violation of either §§ 1981 or 1983.

In paragraphs numbered 6 through 16 of the complaint the petitioner sets forth the factual allegations which formed the basis of the alleged unlawful activity on the part of the respondents. In paragraph 17 of the complaint the petitioner asserted that as a result of those acts he "has been and is continuing to be denied his right to equal employment opportunity..." The alleged misconduct of the respondents set forth in the complaint if proved at trial would be unlawful employment practices prohibited by Title VII, Section 703 (a) (1) and (2) and Section 704 (a). Section 703 (a) (2) prohibits an employer from "... limit(ing), segregat(ing), or classify(ing) his employees ... in any way which would deprive or tend to deprive any individual of *employment opportunities* or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."(Emphasis added). The scope of Title VII's reach into the employment practices of this country has been broadly and expansively defined by cases to numerous to recount here. The scope and breath of Title VII clearly extends far beyond the relatively narrow reach of § 1981's guarantee that all persons shall have the right to make

and enforce contracts on the same footing as white citizens. In this case the petitioner seeks to vindicate his Title VII guarantee of equal employment opportunities under §§ 1981 and 1983. These rights did not exist prior to the 1972 amendments to Title VII. The legislative history clearly shows that claims under § 1981 and § 1983 where to be limited to existing rights and thus an asserted denial of "equal employment opportunity" can not form the basis for suits under §§ 1981 and 1983.

The District Court's holding that "...(i)t is inconsistent with the general statutory scheme of Title VII to permit the consideration of Title VII claims and § 1981 and § 1983 claims based upon Title VII in the same lawsuit..." has substantial support in the cases decided by this Court and discussed above. *Tafoya* v. *Adams*, 612 F.Supp. 1097, 1102 (D.C.Colo. 1985). The District Court's holding that a Title VII plaintiff may assert violations of §§ 1981 and 1983 along with a Title VII claim as long as the claims under §§ 1981 and 1983 are independent and are not based upon violations of rights set forth in Title VII has been followed by a majority of the Courts which have addressed the issue. See *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982); *Day* v. *Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984); *Trigg* v. *Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985); *Green* v. *Illinois Dept. of Transportation*, 609 F.Supp. 1021, 1027 (N.D. Ill. 1985); *Zewde* v. *Elgin Community College*, 601 F.Supp. 1237, 1245-1246 (N.D. Ill 1984); *Ratliff* v. *City of Milwaukee*, 608 F.Supp. 1109, 1128 (E.D. Wis. 1985); *Torres* v. *Wisconsin Department of*

Health & Social Services,592 F.Supp. 922 (E.D. Wis. 1985); *Talley* v. *City of DeSoto*, 37 F.E.P. Cases 375 (N.D. Tex. 1985).

III

The petitioner in this case has failed to plead a colorable § 1983 claim such as a claim for the deprivation of a liberty interest or discharge for exercising first amendment rights. See the Tenth Circuit's carefully considered examination of this issue and its involvement with Title VII in *Owens* v. *Rush*, 654 F.2d 1370 (10th Cir. 1981) and *Owens* v. *Rush*, 636 F.2d 283 (10th Cir. 1980), two separate cases arising out of the same nucleus of facts. See *Cole* v. *Choctaw County Board of Education*, 471 F.2d 777 (5th Cir. 1973) where jurisdiction was premised under 42 U.S.C. §§ 1981 and 1983 and is clear that liability was premised under § 1983 for the governmental employer's unlawful imposition of a penalty (failure to rehire) because the employee had exercised her first amendment right of free speech.

IV

The respondents do not dispute that the pretrial order appears not to have been examined or considered by the Court of Appeals below. The pretrial order clearly stated that:

> The Plaintiff claims that he was discriminated against by the defendants regarding the terms and conditions of his em-

> poyment because of his national origin, Mexican-American, and because he had previously opposed employment practices which he reasonably believed to be unlawful.

Appendix D, Paragraph II A of the pretrial order attached to the petition for writ of *certiorari*. This statement fails to cure the fatal defects found in the petitioner's complaint. Section 1981 provides the guarantee that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens. The petitioner's complaint does not allege that he was not allowed to make a contract with any of the respondents. The complaint nowhere alleges that the petitioner had entered into a contract which he was denied the right of enforcement. These are the essential elements of a claim under § 1981 and they were not pled.

The District Court exercised the requisite degree of caution prior to dismissing the petitioners claims under §§ 1981 and 1983. *Tafoya* v. *Adams, supra.* at 1103. This case now before the Court is not unlike that of the plaintiff in *Owens* v. *Rush,* 636 F.2d 283 (10th Cir. 1980) where the Tenth Circuit noted that "... (a)lthough plaintiff could possibly have presented a colorable § 1983 claim for deprivation of a liberty interest or discharge for exercising first amendment rights, her second amended complaint did not adequately present such claims..." *Owens* v. *Rush, supra.* at 636 F.2d 285. It is possible that the petitioner here, Tafoya, could have presented a colorable claim

under § 1981 that he was denied the same right to make and enforce a contract as is enjoyed by a white citizen, but his complaint and his response to the defendants' motion for summary judgment failed to state a basis for such a claim. The petitioner's complaint and response to the motion for summary judgment fails to state any basis to support a claim for the denial of any constitutional rights thus giving viability to a claim under § 1983.

CONCLUSION

The Opinion and Order of the District Court does not erroneously depart from the legislative history which recognized that claims presented under §§ 1981 and 1983 must have a basis independent from a violation of the rights created and protected by Title VII. The District Court does not misapply the case law from this Court. The District Court's reasoning and conclusion of law are in accord with the majority of the other courts which have considered the issues raised in this case. The District Court's analysis and resolution of the issues in this case is firmly established by the prior decisions where this Court has examined the viability of § 1983 claims where a remedial statute has its own detailed and comprehensive enforcement scheme and his Court's examination of § 1981 claims in conjunction with Title VII. The Court of Appeals correctly ruled that the petitioner's complaint was deficient though on a different ground than that stated in the decision of the Court of Appeals.

The respondents respectfully submit that the proper disposition of this appeal is to deny the writ of *certiorari*.

Respectfully submitted,

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TITLE VII
(1972 Amendments appear in italics)

Sec. 701. For the purposes of this title--

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code),* or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to

procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or* (B) ~~*fifteen*~~ or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, *except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the*

qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) *The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.*

EXEMPTION

Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution,* or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution,* or society of its *activities.*

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or

institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties

of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any appreciceship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704.

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee

controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.